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704706—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 267

THE BANK OF CALIFORNIA NATIONAL ASSOCIATION, EXECUTOR OF THE ESTATE OF MARGARET EYRE GIRVIN, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court entered a memorandum opinion (R. 29–33) which is not reported. The opinion of the Circuit Court of Appeals (R. 54–59) is reported at 155 F. 2d 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 11, 1946. (R. 59–60.) A motion for rehearing was denied May 22, 1946.

(R. 60.) The petition for a writ of certiorari was filed July 3, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust made by the decedent in 1924 was intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811 (c) of the Internal Revenue Code where she reserved the income for life and there was also a possibility that the corpus would revert to her or her estate by operation of law.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set out in the Appendix, *infra,* pp. 9–11.

STATEMENT

In respect of the property the value of which was held by the Circuit Court of Appeals to be includible in the decedent's estate (R. 54–59) the following facts were stipulated (R. 16–19) and as stipulated were found by the Tax Court and appear in its memorandum opinion (R. 29–31):

The property in question was transferred by decedent on June 26, 1924, to a trust which she created on that date. (R. 17, 29.) The property consisted of decedent's half of the community property of the marital community consisting of

herself and her husband who had died shortly before, on April 5, 1924. (R. 18–19, 20–21, 29.) At the date of decedent's death on January 16, 1941, at the age of 78, the property had a fair market value of $97,854.81. (R. 17, 29.) No part of that property or the value thereof was included in the gross estate reported upon the federal estate tax return filed for decedent's estate. (R. 17–18, 29.)

In her deed of trust, decedent transferred the property in question to a trustee who was the same trustee appointed by her deceased husband in a trust created under his will, and decedent declared that the trustee was to hold the trust property for the same uses and purposes as were declared in the trust created in her husband's will (R. 18–19, 21–22, 30.) In that will (R. 22–25) the husband directed the trustee to pay the income to his wife, decedent here, during her life and after her death to divide the trust fund between his son Richard and his daughter Lee in such shares and proportions that the son should receive one moiety or equal half part of the trust fund less seven thousand five hundred dollars and that the daughter should receive one moiety or equal half part of the trust fund and in addition, the seven thousand five hundred dollars. It was also provided that should either of the children die in the lifetime of the wife, decedent here, leaving issue at her death such issue should take the share which

the parent would have taken; and it was further provided that should either of the children die in the lifetime of the wife, decedent here, without issue, then on the death of the wife the survivor should take the whole of the trust fund. (R. 24, 29–30.)

On June 26, 1924, Richard Girvin, decedent's son, had three children, and Lee Girvin Tevis, her daughter, had two children; both children, all five grandchildren and a great grandchild born subsequently were all alive at the date of hearing in the Tax Court. (R. 31.)

The Commissioner included the value of the property of the trust created by the decedent in her gross estate and upon review the Tax Court held the Commissioner's action erroneous. (R. 33.) The Circuit Court of Appeals reversed. (R. 60.)

ARGUMENT

Beside the life estate expressly reserved to the decedent in the income of the trust, the trust estate was subject to a reversion to the decedent in the event that she should have survived her two children and five grandchildren who were living at the time the trust was created, and they should leave no issue. This was a reversion enforceable by the decedent as grantor of the trust, upon the contingency named, for in that contingency the trust deed made no provision for the

disposition of the trust, and through the failure of the declared purposes the trust properly would revert to her. The Circuit Court of Appeals correctly held that the right of reversion characterizes the transfer as one intended to take effect in possession or enjoyment at or after death within the meaning of Section 811 (c) of the Internal Revenue Code (Appendix, *infra*, p. 9), and *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; cf. *Commissioner* v. *Field*, 324 U. S. 113. For only at decedent's death was it certain whether the property would revert to her or be distributed as provided in the trust instrument. Until then the decedent held a string over the total corpus of the trust which might have resulted in altering completely the plan of transmission contemplated by the trust instrument. The decision of the Tax Court was entered before this Court's decision of the *Fidelity Co.* and *Field* cases, and was correctly reversed by the Circuit Court of Appeals.

The taxpayer, not denying the existence of the reversionary interest, distinguishes the *Fidelity Co.* and *Field* cases on the ground only that the interest there was retained by the grantor expressly. (Br. 27, 30–32.) As the court below held (R. 58–59), this is no valid distinction. *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2nd). The applicable Regulations (Treasury Regulations 105, Section 81.17, as

amended by T. D. 5512, Appendix, *infra*, pp. 10–11), require the inclusion in the gross estate of any transferred interest where the decedent or his estate continues to possess any right or interest in the property "whether arising by the express terms of the instrument of transfer or otherwise."[1] This Court has too often rejected such "legal niceties" as to make the question turn upon the conveyancer's subtle silence or his artful terminology. Cf. *United States* v. *Tonkin*, 150 F. 2d 531 (C. C. A. 3rd), certiorari denied November 19, 1945, No. 506, 1945 Term. The Tax Court, more recently than its decision here, has adopted the same view. *Estate of Leaman* v. *Commissioner*, 5 T. C. 699.

There is no conflict with *May* v. *Heiner*, 281 U. S. 238, or *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946 (C. C. A. 2nd). (Br. 13–18, 21–22)[2]

[1] Prior to its amendment by T. D. 5512, Section 81.17 provided that a transfer intended to take effect at or after death includes a transfer where title has passed to the donee or another person and the reverting of the property to the decedent is conditioned on some contingency terminable by his death, and that "In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer."

[2] In *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565 (Ct. Cls). (Br. 33), the court, without deciding whether the operation of local law reserved to the decedent a possibility of reverter, held that because the question was in doubt, and any possibility in any event was remote, the decedent did not "intend" the transfer to take effect at

May v. *Heiner,* has never been taken as involving a reversionary interest in the corpus, and this Court held merely that the reservation of an intermediate life estate, without more, did not make the transfer taxable. In the *Irving Trust Co.* case the limitations ran not to the beneficiaries' issue, upon the failure of which a reversion would arise, but to decedent's issue or in default thereof to such persons as would be entitled thereto under the intestate laws "if he [decedent] had died intestate at the time the contingent remainders took effect." The decision turned upon the meaning and effect of these limitations and the court, denying the Commissioner's contention that the settlor retained a reversion by operation of law, held that the settlor disposed of the entire corpus and "left no legally enforcible rights in himself either by way of reversion or otherwise." 147 F. 2d, p. 948. The same court's later decision in *Commissioner* v. *Bayne's Estate, supra,* is in complete accord with the decision below.

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or after death. In inquiring as to the subjective intention of the decedent, the decision was erroneous, and it is not good authority since the *Fidelity Co.* and *Field* cases, *supra,* which show the question to be governed wholly by what interest decedent retained, and make it clear that the remoteness of the contingent reversion is irrelevant. See *Commissioner* v. *Bayne's Estate, supra.*

CONCLUSION

The decision below is correct and presents no conflict of decisions; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1946.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–10 Int. Rev. Bull. 9]. *Transfers Intended to Take Effect At Or After the Decedent's Death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if
>
> (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).
>
> The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the

power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

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U. S. GOVERNMENT PRINTING OFFICE: 1948